

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 13 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

AMIRABAD HOSSEIN BARGHI, a/k/a
Fakhri Amirbadi, Fakhry Amir Abudi,
Fakhri Amir Abudi Dines, and Fakhri
Hossein Barghi,

Defendant - Appellant.

No. 05-50045

D.C. No. CR-04-00544-WJR

MEMORANDUM^{*}

Appeal from the United States District Court
for the Central District of California
William J. Rea, District Judge, Presiding

Argued and Submitted March 6, 2006
Pasadena, California

Before: McKEOWN and BERZON, Circuit Judges, and KING, ^{**} District Judge.

Amirabad Hossein Barghi appeals her conviction for theft of government property in violation of 18 U.S.C. § 641. Barghi contends the district court erred in

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

instructing the jury that the government need not prove she knew her acts or omissions were unlawful. She also argues the district court erred in admitting evidence of the “Arcos properties” that she did not own when she received excess benefits, claiming the evidence was either irrelevant or too prejudicial. We affirm.

Because Barghi did not challenge the jury instruction below, we review for plain error. *United States v. Delgado*, 357 F.3d 1061, 1065 (9th Cir. 2004). “An improper instruction rarely justifies a finding of plain error.” *United States v. Glickman*, 604 F.2d 625, 632 (9th Cir. 1979). Reversal on this basis is “warranted only if it is ‘highly probable that the error materially affected the verdict.’” *United States v. Marin-Cuevas*, 147 F.3d 889, 893 (9th Cir. 1998) (quoting *United States v. Kessi*, 868 F.2d 1097, 1103 (9th Cir. 1989)).

Barghi asserts her defense at trial was that, although she received excess benefits by failing to disclose certain assets which rendered her ineligible, she was not guilty because “she did not know what she was required to report.” Instructing the jury that it need not find she knew her acts or omissions were unlawful constitutes reversible error, Barghi contends, because the instruction “allowed the jury to convict [her] even if it believed her defense.” We disagree.

The district court instructed the jury that to convict Barghi it must find she acted “knowingly.” It then instructed, “An act is done knowingly if the defendant

is aware of the act and does not act through ignorance, mistake, or accident.” With this charge, the jury could have acquitted Barghi based on her defense, finding she failed to fully disclose her assets because she was ignorant of, or mistaken as to, what assets she was required to disclose. Thus, even if the district court erred in instructing the jury that it need not find Barghi knew her incomplete disclosure and corresponding receipt of overpayments violated the law (which we do not decide) Barghi has not shown the requisite “high[] probab[ility]” that any such error “materially affected the verdict.” *See id.*

Because the district court did not definitively rule on Barghi’s in limine motion to exclude evidence of the Arcos properties and Barghi did not object to its admission at trial, she did not preserve the issue for appeal. *See United States v. Archdale*, 229 F.3d 861, 864-65 (9th Cir. 2000). Accepting this, Barghi argues we should review for plain error. Countering, the government contends Barghi waived, rather than forfeited, the argument and, thus, any error is unreviewable. We agree. “Forfeiture is the failure to make a timely assertion of a right, whereas waiver is the ‘intentional relinquishment or abandonment of a known right.’” *United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997) (en banc) (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)). “Forfeited rights are reviewable for plain error, while waived rights are not.” *Id.* After moving in

limine to exclude evidence of the Arcos properties as irrelevant and prejudicial, Barghi requested the court reserve ruling on her motion until the government offered the evidence at trial. When the government offered such evidence, however, Barghi affirmatively stated she had no objection to its admission. She then (1) elicited testimony to establish she disposed of the properties before she received any benefits, (2) cross-examined witnesses about whether she was required to disclose her ownership of the properties, and (3) argued in closing that no such disclosure was ever required. Under these circumstances, Barghi waived, rather than forfeited, her right to object on the ground she now raises. Her present assignment of error is not reviewable.

AFFIRMED.